

Cause No. DC 117127

RAYMOND JAMES FINANCIAL SERVICES, INC.	§	IN THE DISTRICT COURT
	§	
	§	
PLAINTIFF,	§	
	§	
VS.	§	
	§	298 <sup>th</sup> JUDICIAL DISTRICT
HURSHEL TYLER AND THE ESTATE OF MILDRED TYLER, DECEASED, BY HER INDEPENDENT EXECUTOR BILL TYLER	§	
	§	
	§	
DEFENDANTS	§	DALLAS COUNTY, TEXAS

**DEFENDANTS’ OPPOSITION TO RAYMOND JAMES FINANCIAL SERVICES, INC.’S ORIGINAL PETITION AND MOTION TO MODIFY, CORRECT AND/OR VACATE ARBITRATION AWARD  
AND  
DEFENDANTS’ BRIEF IN SUPPORT OF ITS MOTION AND APPLICATION TO CONFIRM ARBITRATION AWARD**

COME NOW Hurshel Tyler and the Estate of Mildred Tyler, Deceased, by her Independent Executor Bill Tyler (hereinafter referred to as “the Tylers” or “Defendants”) and file this their Response to the Original Petition and Motion to Modify, Correct and/or Vacate Arbitration Award (hereinafter referred to as the “Challenge”) filed by Raymond James Financial Services, Inc. (hereinafter referred to as “Plaintiff”). This Response also serves as Defendants’ Brief in Support of its Motion and Application to Confirm Arbitration Award.

**I.**

**INTRODUCTION**

Having imposed binding arbitration in all of its agreements, Plaintiff wants to avoid the “binding” part, once it faces a large, adverse Award. As the Court is likely aware, the Texas and Federal Arbitration Acts, as well as controlling case authorities, prohibit court review of an

arbitration panel's factual or legal findings. Yet it is precisely such a prohibited view of legal determinations that Plaintiff seeks in its complaints about the arbitration panel applying Texas law. Plaintiff's other two complaints – relating to miscalculation and the rescission remedy – are wholly without factual support in the record. By seeking a return of the investments to remedy the purported “miscalculation”, Plaintiff seeks to negate the Panel's compensatory award to the Tylers and convert it to an over \$170,000 compensatory award to Plaintiff, the wrongdoer! Regardless, Plaintiff cannot overcome the extreme standard for overturning an arbitration award in court, and its Challenge must be denied.

## **II.**

### **FACTUAL BACKGROUND**

Plaintiff filed this action seeking to challenge a securities arbitration conducted by the Financial Industry Regulatory Authority (FINRA) which resulted in a May 10, 2011 arbitration Award, a copy of which is attached as Exhibit A. The underlying arbitration arose from a series of wrongful acts on the part of a Branch Office Manager in Plaintiff's Amarillo, Texas office who upon being assigned to handle the Tylers' brokerage accounts, liquidated the Tylers' \$3.5 million bond portfolio and invested the money in complex, long term, costly annuities and life insurance products with equity exposure of over 80%. In this dramatic shift in investments, Plaintiff made over \$700,000 in commissions. Volume 4 of Transcript, p.99, lines 15 – 20. The evidence presented at the arbitration showed that Plaintiff was responsible for the wrongful acts, not only because of the doctrine of respondeat superior but also because Plaintiff Raymond James committed its own wrongdoing - in failing to supervise the Branch Office Manager and in failing to supervise the Tylers' accounts. The FINRA arbitrators agreed and found Plaintiff liable based upon respondeat superior and separately for violating FINRA Rule 3010 (the

Supervision Rule)<sup>1</sup>. In addition, the arbitration panel found that Plaintiff violated FINRA Rule 2310 (the Suitability Rule)<sup>2</sup> and that it had breached its contract with the Tylers.

Plaintiff's agreements with the Tylers contained a binding arbitration provision that forced the Tylers to forego court and file their claim in arbitration. It provided in pertinent part:

**Arbitration Disclosures:**

**Arbitration is final and binding on the parties.**

The parties are waiving their right to seek remedies in court, including the right to trial by jury.

Pre-arbitration discovery is generally more limited than and different from court proceedings.

**The arbitrators' award is not required to include factual findings or legal reasoning and any party's right to appeal or seek modification of rulings by the arbitrators is strictly limited.**

...

**Arbitration and Dispute Resolution: (a) Any dispute or controversy, either arising in the future or in existence now, between me and you** (including your offices, directors, employees or agents and the introducing broker, if applicable) **will be resolved by arbitration** conducted before the New York Stock Exchange, Inc., the National Association of Securities Dealers, Inc., the American Stock Exchange, Inc. or other self-regulatory organizations (SRO) subject to the jurisdiction of the Securities and Exchange Commission (SEC) pursuant to the arbitration rules of the applicable SRO, and in accordance with the Federal Arbitration Act (Title 9 of the United States Code).

**(b) A court of competent jurisdiction may enter judgment based on the award rendered by the arbitrators.**

The agreements are attached as Exhibit B with pertinent sections highlighted [emphasis added].

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<sup>1</sup> Available for viewing at: [http://finra.complinet.com/en/display/display\\_main.html?rbid=2403&element\\_id=3717](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=3717)

<sup>2</sup> Available for viewing at: [http://finra.complinet.com/en/display/display\\_main.html?rbid=2403&element\\_id=3638](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=3638)

On May 5, 2010 the Tylers filed their initial Statement of Claim with FINRA, commencing arbitration proceedings styled *Hurshel Tyler And His Wife Mildred Tyler, by and through her power of attorney Bill Tyler vs. Raymond James Financial Services, Inc. and LPL Financial Corporation*, FINRA arbitration No. 10-12162. Plaintiff then filed its Submission Agreement in response, and expressly agreed to arbitrate all of the Tylers' claims before FINRA, a copy of which is attached as Exhibit C. Over the next 10 months, the parties engaged in extensive pre-hearing litigation, including exhaustive discovery and motion practice involving both procedural and dispositive motions. Before the commencement of the arbitration, Mildred Tyler passed away and Defendants settled with LPL Financial Corporation. Defendants' Statement of Claim detailed the wrongdoing that occurred and the rules, regulations and laws that were violated as a result. A copy of Defendants' Statement of Claim is attached as Exhibit D. Plaintiff asserted various defenses. A copy of Defendant's Response is attached as Exhibit E.

The arbitration commenced on March 21, 2011 in Dallas, Texas and lasted five consecutive days. At the conclusion of the arbitration hearing, when asked by the Arbitrator Freeman, the Chairman of the three-person arbitration panel, both parties represented that they were treated fairly and were able to put on their case without any remaining issues<sup>3</sup>:

19            ARBITRATOR FREEMAN:

... Are there any other issues or

22 objections you think we need to get on the record

23 here?

24            MS. STONEMAN: I don't think so.

25            MS. REYES: No.

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<sup>3</sup> Ms. Stoneman represented the Tylers and Ms. Reyes represented Raymond James Financial Services, Inc..

1           ARBITRATOR FREEMAN: What I would like to  
2 ask you to do, I would like those two witness books,  
3 if you don't mind, leave those here. We are going to  
4 go to lunch and come back to the room and start to  
5 plan out how we are going to attack this. So if you  
6 pack up all of your stuff. Do you feel you have  
7 gotten your case said?

8           MS. REYES: Yes.

9           MS. STONEMAN: Yes, we do.

10          ARBITRATOR FREEMAN: Been treated fairly?

11          MS. STONEMAN: Yes.

12          ARBITRATOR FREEMAN: No objections.

13 Okay.

Volume 5 of the Transcript, p.185 line 21 – p.186, line 13.

The arbitrators issued the Award on May 10, 2011 and awarded the Tylers \$1,129,796 in compensatory damages, 5% interest on that sum from December 1, 2006 through May 10, 2011 (which amount is \$251,066), \$34,988 in arbitration costs, \$82,281 in IRS related costs, and \$250,000 in attorneys' fees for a total monetary award of \$1,738,141.

On June 7, 2011, the Tylers filed a Motion and Application to Confirm Arbitration Award in the 90<sup>th</sup> Judicial District Court in Young County, Texas, Mr. Tyler's county of residence. The next day on June 8, 2011, Plaintiff filed its Challenge in this Court. After the Tylers agreed to transfer venue of the case to this court, Tyler's counsel proposed to Plaintiff's counsel that we choose a date by which we would each file a brief supporting our respective

positions. Plaintiff's counsel represented that its arguments were contained in the Petition that it filed and thus a brief on its part would be unnecessary. Plaintiff's counsel suggested that we instead choose a date by which Claimants would file a response to the Challenge and a date for Plaintiff to reply after which we would have a hearing on the issues to be scheduled in September after Labor Day. The parties filed a Rule 11 Agreement to this effect. Since then, a hearing has been scheduled for Friday, September 16 at 10:30 a.m. for oral argument on Plaintiff's Challenge and Defendants' Motion to Confirm Arbitration Award.

Accordingly, the Tylers hereby file their opposition to Plaintiff's effort to vacate, modify, or correct the arbitration award pursuant to Tex. Civ. Prac. & Rem. Code § 171 and the Federal Arbitration Act 9 U.S.C.A. § 11. In so doing, the Tylers also provide the court with authority to grant their Motion to Confirm the Arbitration Award.

### **III.**

#### **LEGAL STANDARD AND SUMMARY OF ISSUES**

Texas law favors arbitration. Brazoria v. Knutson, 142 Tex. 172, 176 S.W.2d 740 (1944); L.H. Lacy Co. v. City of Lubbock, 559 S.W.2d 348, 351 (Tex.1977); see also, Prudential Secs., Inc. v. Marshall, 909 S.W.2d 896, 900 (Tex. 1995) (orig. proceeding) (per curiam) (arbitration is inexpensive, rapid alternative to traditional litigation procedures). Indeed, arbitration has found such favor with Texas courts that every reasonable presumption must be indulged in to uphold arbitration awards. Island on Lake Travis, Ltd. v. Hayman Co. General Contractors, Inc., 834 S.W.2d 529 (Tex. App. - Austin 1992, writ granted, judgm't vacated w.r.m.). Massey v. Galvan, 822 S.W.2d 309, 316 (Tex. App. 1992, writ denied); Carpenter v. North River Ins. Co., 436 S.W.2d 549, 553 (Tex. Civ. App. 1968, writ ref'd n.r.e.).

Judicial review of an arbitration award adds expense and delay and thereby diminishes the benefits of arbitration as an efficient, economical system for resolving disputes, and, accordingly, review of an arbitration award is extraordinarily narrow. Ancor Holdings, LLC v. Peterson, Goldman & Villani, Inc., 294 S.W.3d 818, 825 (Tex. App.–Dallas, 2009); CVN Group, Inc. v. Delgado, 95 S.W.3d 234, 238 (Tex. 2002); IPCO-G.&C. Joint Venture v. A.B. Chance Co., 65 S.W.3d 252, 255 (Tex. App.–Houston [1 Dist.], 2001). Such review should be not only limited but expeditious. Crossmark, Inc. v. Hazar, 124 S.W.3d 422 (Tex. App.–Dallas, 2004). Judicial review of an arbitration award is so limited that an award may not be vacated even if there is a mistake of fact or law. In re Guardianship of Cantu de Villarreal, 330 S.W.3d 11, 18 (Tex. App.–Corpus Christi, 2010).

“Arbitration awards are entitled to great deference by the courts lest disappointed litigants seek to overturn every unfavorable arbitration award in court.” Crossmark at 429; Ancor Holdings at 826. Because of the deference given to arbitration awards, judicial scrutiny focuses on the integrity of the process, not the propriety of the result. *Id.* An arbitration award has the same effect as a judgment of a court of last resort, and the trial judge reviewing an award may not substitute her judgment for that of the arbiters merely because she would have reached a different conclusion. Bailey and Williams v. Westfall, 727 S.W.2d 86, 90 (Tex. App.–Dallas, 1987). Whatever indignation a reviewing court may experience in examining an arbitration record, it must resist the temptation to condemn imperfect proceedings without a sound statutory basis for doing so. Millmaker v. Brusco, 2008 WL 4560624 (S.D. Tex. 2008), quoting Prestige Ford v. Ford Dealer Computer Servs., Inc., 324 F.3d 391, 394 (5th Cir. 2003). Courts may not independently review an “arbitrator’s decision on the merits despite allegations that the decision

rests on factual errors or misinterprets the parties' agreement." Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (2001).

The Texas Supreme Court has ruled that a court reviewing an arbitration award lacks jurisdiction to review complaints that do not assert statutory, common law, or public policy grounds to vacate or modify the award. See, CVN Group, Inc. v. Delgado, 95 S.W.3d 234, 239 (Tex. 2002). Plaintiff has alleged statutory grounds on which to modify or vacate the Tyler's arbitration award, however, as will be shown, the evidence on which Plaintiff relies in meeting this burden is like trying to fit a square peg into a round hole. Plaintiff fails to acknowledge the principles that judicial review of arbitration decisions, on both the facts and the law, is extremely limited and is amongst the narrowest known to the law, and that the courts are without authority to second-guess the arbitrators' findings or conclusions.

Plaintiff's challenge is premised on the following three grounds:

1. There is an evident miscalculation of numbers which can be corrected by requiring the arbitration panel to order the return of the investments to Plaintiff.
2. The arbitrators exceeded their powers by awarding attorneys' fees under Texas law, because Florida law applied to the case and thus the attorney's fee portion of the Award should be vacated.
3. In the alternative, the arbitrators exceeded their authority by awarding relief not requested in that Defendants specifically chose rescission rather than damages and emphasized their right to forego damages and insist upon a rescissionary remedy.

Each of these three grounds has no basis. As will be shown, there was no "evident miscalculation of numbers". Plaintiff's tortured reading of the Award to support this argument is a stretch, at best. As for Plaintiff's argument that Florida, not Texas law, applied to the case, this

argument was a surprise to Defendants, since Plaintiff didn't utter one word about the application of Florida law in the five-day arbitration, nor in its legal brief filed with the arbitration panel. Nonetheless, an arbitrators' application of the law, even if an outright mistake, is not reviewable by the court. The same is true for Plaintiff's argument that the panel exceeded its authority by awarding relief not requested, although the Tylers will show that the basis of Plaintiff's factual claim has no support. Contrary to Plaintiff's assertions, the record reflects that Defendants asked the arbitrators to award a monetary figure that did **not** require as a component that the Tylers return the investments to Plaintiff. Moreover, FINRA arbitrators are instructed that "rescission" may or may not include the return of the securities at issue.

Plaintiff showed its true colors in its Challenge when it wrote, "as of the time Defendants moved their accounts from RJFS, they [the Tylers] had gains in the subject annuities of over \$958,000.00."<sup>4</sup> This statement is totally irrelevant to any issue before the court and serves no purpose other than to highlight that Plaintiff did not think the Award was fair or right.<sup>5</sup> In any event, this may help explain what motivated Plaintiff to file this baseless Challenge.

### **1. There Is No Evident Miscalculation Of Numbers or Figures**

The Texas statutory language upon which Plaintiff relies allows the court to modify the Award if there is "an evident miscalculation of numbers." Civil Practice & Remedies Code § 171.091(a)(1)(A). 9 U.S.C.A. § 11(a) refers to "an evident material miscalculation of figures." Plaintiff's claim that the arbitrators "failed to require the return of the securities made the bases

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<sup>4</sup> The cited to figure does not appear in the record; rather, one must add together figures in the record that are 100 pages apart. In addition, one of the figures came from Plaintiff's counsel, and was not corroborated by the witness.

<sup>5</sup> Defendants have the opposite view and were disappointed that the Award was not significantly higher.

of the transactions” does not qualify as either a “miscalculation of numbers” or a “miscalculation of figures”.

Texas has articulated the standard for this statutory basis for modification of an award:

A court may not overturn an award based upon “evident miscalculation of figures” unless the mistake is clear, concise and conclusive from the record. “Miscalculation” implies inadvertence or an error caused by oversight. If the amount of the award is rationally inferable from the facts before the arbitrator, there is no evident miscalculation of figures. Furthermore, if the amount of the award falls within the range established by the testimony, we should not disturb the award on that basis. A claimant’s dissatisfaction with the amount of an award will not support a judicial modification of that award.

Vernon E. Faulconer, Inc. v. HFI, Ltd. Partnership, 970 S.W.2d 36, 39 (Tex. App.–Tyler, 1998), citations omitted.

Plaintiff has failed to show the arbitrators made any miscalculation or mistake in calculating the award. The Tyler’s counsel stated in her closing argument to the panel:

9 And don't forget that we are -- a part of  
10 that award of 3.5 million includes the tender of the  
11 investments, all three of them, back to Raymond James.  
12 And if for some reason you are uncomfortable with that  
13 or you believe that is too administratively difficult  
14 to accomplish, then Mr. Tyler will retain those  
15 investments and dispose of them at his choosing, but  
16 then don't subtract from the award the \$1.3 million.

Volume 5 of the Transcript, p.179 lines 9 – 16.

Plaintiff’s claim that the arbitrators made a “miscalculation” by not ordering the investments returned to Plaintiff is undercut by the fact that Defendants offered to the panel a

remedy that did not require a return of the investments to Plaintiff. The record indicates that this is precisely what the arbitrators did – they agreed upon a monetary figure that allowed the Tylers to retain the investments at issue. Accordingly, there is simply no evidence of a mistake or miscalculation, much less an “evident” one. Rather, it was the panel’s deliberate disposition of a substantive dispute rationally inferable from the facts in the record.

Moreover, Plaintiff’s arguments fail every element that comprises the statutory basis for miscalculation. The most obvious is that Plaintiff’s claim does not even contain any numbers or figures that are the hallmark of a miscalculation claim. See, Millmaker v. Brusco, 2008 WL 4560624 (S.D. Tex. 2008)(miscalculation where arbitrators awarded fees and expenses, a portion of which had been double counted); NetKnowledge Technologies, L.L.C. v. Rapid Transmit Technologies, 2007 WL 518548 (N.D. Tex. 2007), aff’d on other grounds, 269 Fed. Appx. 443 (5th Cir. 2008)(arbitrator's duplication of figures was a double-counting of a claim for damages, which court corrected under the Federal Arbitration Act, 9 U.S.C.A. § 11(a)).

What Plaintiff is asking this Court to do is examine the intent of the arbitrators in how they came up with their Award, and this should not be permitted. Plaintiff’s argument is not unlike that made in Fogal v. Stature Const., Inc., 294 S.W.3d 708, 711 (Tex. App. Houston 1st Dist. 2009), review denied, (Oct. 23, 2009), where the challenging party complained about the failure of the arbitrator to include prejudgment interest in the arbitration award. The court held that this was not an evident material miscalculation under the Federal Arbitration Act (FAA) for modifying the award. 9 U.S.C.A. § 11.

Importantly, the foundation of Plaintiff's claim – that it's "clear that the Panel awarded rescission" – is, quite simply, false. Rather, the face of the Award evidences that the arbitrators rejected Defendants' rescissionary claim:

- At the hearing, Claimants presented varying theories of recovery.
- The range of their damages requested for rescission was...
- Respondent, Raymond James Financial Services, Inc., is liable for and shall pay to Claimants, Hurshel Tyler and the Estate of Mildred Tyler, Deceased, Bill Tyler, Independent Executor, the sum of \$1,129,796.00 in **compensatory damages**.

Exhibit A, the Award, pp. 2 and 4, emphasis added.

The language that the Panel chose to use in the Award acknowledges that Defendants requested rescission but instead it awarded compensatory damages. Compensatory damages are defined in most legal dictionaries as payment for actual injury or economic loss, which is distinguishable from a rescissionary award. So assigning the words used their commonly understood meaning, rescission was **not** awarded.

In addition, the Panel's findings on liability support the conclusion that the Panel awarded a compensatory remedy, as opposed to a rescissionary one. The Panel sustained Defendants' claims of "suitability, failure to supervise, respondeat superior, breach of contract, and violations of FINRA Rules 2310 and 3010." These claims which are torts and breach of contract require compensatory damages. And the Panel "rejected Claimants' causes of actions: Texas Deceptive Trade Practices, Texas Insurance Law violations, violations of various securities laws, breach of fiduciary duty, and common law fraud." Exhibit A, the Award, p.3. Therefore, the Panel rejected Defendants' only causes of action - the statutory claims - that specifically provide for and allow a rescissionary recovery. Thus, the overwhelming weight of

the evidence based on the Award itself is that the Panel meant what it wrote when it awarded “the sum of \$1,129,796.00 in compensatory damages.”

The evidence is also stronger that the Panel awarded a compensatory amount, as opposed to a rescissionary amount for reasons that go beyond the language the Panel used in the Award. In their Statement of Claim filed with FINRA, the Tylers pled both rescissionary and actual or compensatory damages. Exhibit D, Statement of Claim, p.26. At the arbitration, though the Defendants urged the Panel to make a rescissionary award, a compensatory award was not off of the table. In the opening statement, Defendants’ counsel stated, “when you hear our expert discuss the recovery and the rescission calculations that we’re presenting to you in this case...” Volume 1 of Transcript, p.42, lines 7 – 10. “Recovery” is different than “rescission”. And the Tylers’ counsel closed her opening with the following statement:

7           In closing, I would simply say and remind  
8 you, gentlemen, that each cause of action is  
9 actionable; that claimants really need only prove one  
10 cause of action in order to allow you to render an  
11 award; and most importantly, that we are here not out  
12 on any limbs. We're not trying to get something we  
13 don't think we're entitled to or can get under the  
14 law, and that's all we ask you gentlemen to do, is  
15 hear the evidence and **do what you think is right, and**  
16 **do what you think is equitable in this circumstance.**  
17 Thank you very much.

[emphasis added].

Accordingly, it is not accurate to state that the “only remedy” sought was rescission with a return of the investments as Plaintiff has claimed in its Challenge.

Defendants’ counsel then questioned Defendants’ expert David Sanderford about damages in the following exchange:

12 Q. Okay. In your opinion, if this panel finds  
13 liability, would damages be an adequate remedy for  
14 Mr. Tyler?

15 A. I think it would be inadequate remedy. I  
16 think an equitable remedy, such as rescission, is **more**  
17 **appropriate**, especially in light of what I call an  
18 ongoing and egregious and willful intention to avoid  
19 the broker's responsibility to Mr. Tyler.

Volume 2 of Transcript, p.467, lines 12 – 19.

[emphasis added].

Defendants’ expert recognized that although rescission was a “more appropriate” remedy, the Panel instead could choose to award a damage or compensatory remedy, which is what the panel did.

Plaintiff argues rather curiously that “The various elements of the award make it clear that the Panel awarded rescission” (p.3 of Plaintiff’s Challenge). This claim likewise has no support. The first element, as discussed above, uses the phrase “compensatory damages” to describe the \$1,129,796.00 figure. Even assuming for the sake of argument that the panel had instead written, “the sum of \$1,129,796.00 in rescissionary damages”, which it could have done,

there would still be an absence of any miscalculation. In the parlance of securities arbitration proceedings, the term rescission does not necessarily entail a return of the investments. FINRA's procedures include training its arbitrators. FINRA provides its arbitrators with the Arbitrator's Guide, a lengthy document that provides arbitrators with important information about their responsibilities and duties as arbitrators in securities cases. Attached as Exhibit F are select pages from the Guide. Importantly, FINRA advises arbitrators that rescission may or may not include a return of the investments:

### **Other Remedies**

#### **Rescission**

Rescission is designed to place the claimant in the same position occupied before the wrongful transaction. It **may** include the return of the securities at issue.

Exhibit F, FINRA Arbitrator's Guide, p.49 [emphasis added].

According to FINRA, arbitrators are empowered to award the remedy of rescission but not require a return of the investments. So even assuming the arbitrators awarded a sum that they characterized as rescission, this would not give rise to an "evident miscalculation."

Plaintiff's miscalculation argument would be stronger if the panel had awarded an amount that exactly matched the rescission amount sought by the Tylers, because arguably such sum envisioned a return of the investments to Plaintiffs. To illustrate, the arbitrators recited the following in the Award:

At the hearing, Claimants presented varying theories of recovery. The range of their damages requested for rescission was calculated with the withdrawals and interest in three different scenarios and the results were \$3,543,454.00; \$3,546,627.00; and \$3,534,641.00 with reductions of \$377,471.00; \$374,298.00; and \$386,284.00.

At the arbitration hearing, evidence was introduced that established that the terminal (or ending) value of the three investments to be returned to Plaintiff was \$1.3 million. Volume 3 of the Transcript, p.503, lines 6 – 24. The above figures take into account a return of the investments and hence a credit to Plaintiff of \$1.3 million. Hypothetically, if the panel instead had awarded the sum of \$3,165,983, \$3,172,329 or \$3,148,357 (the respective results of the offsets described above), then Plaintiffs might argue that a miscalculation is evident by virtue of the fact that without a return of the investments, Plaintiff is deprived of the credit of \$1.3 million. But that would only be the case if the panel awarded a figure that equaled the rescission amount sought.

It is significant that the \$1,129,796.00 awarded by the arbitrators is significantly less than the rescission amount sought by the Defendants, even when the terminal value is deducted from each figure: the resulting values are \$1,865,983, \$1,872,329 and \$1,848,357. This is further evidence of the absence of any miscalculation; the Panel found liability and clearly intended to award Defendants compensation for the violations. But if this court grants Plaintiff the relief it is requesting and forces a return the investments to Plaintiff at a value of \$1.3 million, the result is that there would be a negative compensatory award! It would be as if the Plaintiff, the wrongdoer, was awarded \$170,204. That is such a clear contravention of what the Panel intended that it should not be countenanced.

Nor does the second element of the Award “make it clear that the arbitrators awarded rescission.” The panel awarded “interest on the above-stated sum at the rate of 5% per annum from and including December 1, 2006 through and including the date the Award is served.” The panel’s reference to “the above stated sum” is to the compensatory damage amount of \$1,129,796.00, so there’s no reference to rescission there. Moreover, pre and post-judgment

interest is commonly awarded by securities arbitration panels and it is usually at the interest rate prescribed by applicable state law. The 5% figure represents the judgment rate set forth in Chapter 304 of the Texas Finance Code and is the rate that should be used whether the panel ordered a rescission remedy or a compensatory damage remedy.

The third element of the Award is “the sum of \$34,988.00 in costs for expenses.” Again, it is axiomatic that there is nothing in this element that makes “it clear that the arbitrators awarded rescission.” The same is true for the fourth and fifth elements of the Award. In the fourth element, the panel likewise spelled out that “the sum of \$82,281.00” was for “costs for IRS penalties on taxes past due.” And the last element was for “the sum of \$250,000.00 in attorneys' fees pursuant to Texas statute on breach of contract.” These elements make no reference to rescission. Plaintiff does not explain, and logically cannot explain, how “The various elements of the award make it clear that the Panel awarded rescission” (p.3 of Plaintiff’s Challenge). Plaintiff’s purported “miscalculation” is not evident on the face of the Award nor in the record.

The panel’s decision cannot be characterized as an evident miscalculation but rather a factual decision on the part of the arbitrators that was within the arbitrators’ discretion. The compensatory damage figure of \$1,129,796.00 awarded by the panel was precise and thus the result of a conscious decision. The arbitrators were not required to explain how they arrived at the compensatory figure. Though the parties could have agreed to require the arbitration panel to issue an “explained” award, the parties made no such agreement. FINRA Rule 12904, in pertinent part, outlines the process:

## FINRA Rule 12904. Awards

(f) The award **may** contain a rationale underlying the award.

### (g) Explained Decisions

**(1) This paragraph (g) applies only when all parties jointly request an explained decision.**

**(2) An explained decision is a fact-based award stating the general reason(s) for the arbitrators' decision.** Inclusion of legal authorities and damage calculations is not required.

**(3) Parties must make any request for an explained decision no later than the time for the prehearing exchange of documents and witness lists under Rule 12514(d).**

[emphasis added].<sup>6</sup>

FINRA Rule 12904 makes clear that the arbitration panel is under no obligation to enlighten the parties about their rationale underlying the award or any explanation for their result. The parties' agreement with each other likewise states, "The arbitrators' award is not required to include factual findings or legal reasoning..." See Exhibit B, Agreements. Without an explanation, the figure in an arbitration award is always an uncertainty. The parties addressed this issue during the arbitration when the Chairman asked the parties about whether or not they requested a "reasoned" or explained award:

8            ARBITRATOR FREEMAN: By the way, I don't

9 recall that you folks asked for a reasoned award.

10           MS. STONEMAN: That's correct.

11           ARBITRATOR FREEMAN: So you're not going

12 to know how we did it.

13           MS. STONEMAN: That's right.

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<sup>6</sup> Available for viewing at:

<http://www.finra.org/web/groups/industry/@ip/@reg/@rulfil/documents/rulefilings/p018366.pdf>

14 ARBITRATOR FREEMAN: It's going to be a  
15 mystery when you get it.

16 MS. STONEMAN: That's right.

17 MS. REYES: The amount of time we spend  
18 when we get an award when a number is just a crazy  
19 number.

20 MS. STONEMAN: It's always a crazy  
21 number.

22 MS. REYES: 75 percent of this and -- we  
23 always try to figure it out.

Volume 5 of the Transcript, p.124, lines 8 – 23.

“When parties agree to arbitration, they agree to accept whatever reasonable uncertainties might arise from the process. The size of the award is one such uncertainty and a claimant's dissatisfaction alone will not support judicial modification of that award.” Babcock & Wilcox Co. v. PMAC, Ltd., 863 S.W.2d 225, 235 (Tex. App.–Hous. [14 Dist.], 1993)(citations omitted). Despite the fact that it is not known how the arbitrators arrived at the \$1,129,796.00 compensatory figure, there is every reason to believe that the Award accurately reflects the arbitrator's intent and the figure is rationally inferable from the facts before the arbitrators. Arbitrators traditionally enjoy broad authority to fashion remedies designed to fit the specific issues presented to them under an arbitration agreement. CVN Group, Inc. v. Delgado, 47 S.W.3d 157, 162 (Tex. App.–Austin, 2001).

Defendants urge the court reject Plaintiff's contention of miscalculation on the basis that Plaintiff has failed to sustain its burden of proof in establishing that there was an evident miscalculation of numbers or figures.

## **2. The Arbitrators Did Not Exceed Their Powers By Awarding Attorneys' Fees Under Texas Law**

There are a multitude of reasons the Court should deny Plaintiff's request to vacate the attorney fee portion of the arbitrators' Award: a) in making this argument, Plaintiff has violated a FINRA rule which prohibits firms from using an arbitration agreement to limit the ability of the arbitrators to make an award; b) presumably the arbitrators' considered Plaintiff's contention that Florida law applied, as it claimed in its Answer, and rejected it, instead choosing Texas law; c) the panel acted within its authority and powers by applying Texas law, d) Plaintiff's failure to argue the application of Florida law in either its pre-hearing brief or at any time during the five-day arbitration constitutes a waiver, and e) Plaintiff pled for recovery of its own attorneys' fees, so Plaintiff's argument is disingenuous. For all of these reasons, Plaintiff's argument should be denied.

### **a) Plaintiff's Argument is in Violation of FINRA Rule 3110(f)(4)**

Plaintiff's argument that the arbitrators exceeded their authority by awarding attorneys' fees in contravention of the agreement that requires Florida law to apply is a violation of FINRA Rule 3110 (the Books and Records rule). FINRA Rule 3110(f)(4) provides:

(4) No predispute arbitration agreement shall include any condition that:

(A) limits or contradicts the rules of any self-regulatory organization;

(B) limits the ability of a party to file any claim in arbitration;

(C) limits the ability of a party to file any claim in court permitted to be filed in court under the rules of the forums in which a claim may be filed under the agreement;

**(D) limits the ability of arbitrators to make any award.**

[emphasis added].<sup>7</sup>

Plaintiff agreed to abide by the rules and procedures of FINRA in the Submission Agreement that Plaintiff signed submitting this case to arbitration:

The parties hereby state that they or their representative(s) have read the procedures and rules of FINRA relating to arbitration, and the parties agree to be bound by these procedures and rules.

Exhibit C, Submission Agreement, para. 2.

For many years, the National Association of Securities Dealers (NASD), now FINRA, has interpreted this rule to prohibit firms from arguing that arbitrators could not make a particular award based upon the choice of law clause in the customer agreement. In 1999, the NASD sanctioned Merrill Lynch and Bear Stearns for improperly using New York choice of law clauses in customer arbitration agreements. The firms argued in arbitration proceedings that under New York law, arbitrators could not award punitive damages or attorneys' fees, because they were not allowed under New York law. The sanctioned firms committed the violations between 1994 and 1997, and **were censured and fined, and ordered to withdraw any New York law arguments from pending cases.** Copies of the disciplinary actions for Merrill Lynch and Bear Stearns are attached respectively as Exhibits G and H. The NASD had warned member firms as early as 1995 that they should not "include **nor seek to enforce** provisions in customer agreements that restrict or limit...the ability of customers to arbitrate disputes or the authority of the arbitrators to make an award...." Notice to Members<sup>8</sup> 95-85 is attached as Exhibit I<sup>9</sup>. More recently, in 2002 Prudential Securities attempted to make the same arguments in arbitration and

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<sup>7</sup> Available for viewing at: [http://finra.complinet.com/en/display/display\\_main.html?rbid=2403&element\\_id=3734](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=3734)

<sup>8</sup> The NASD/FINRA publishes Notices to provide firms with timely information on a variety of issues. These Notices are available at the FINRA.org website.

<sup>9</sup> Also available for viewing at:  
[http://finra.complinet.com/en/display/display\\_main.html?rbid=2403&element\\_id=1871](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=1871)

the firm was likewise sanctioned by the NASD. Prudential's disciplinary action is attached as Exhibit J. Each of these sanctioned firms was ordered to withdraw the choice-of-law arguments that they were making in pending arbitrations.

Plaintiff is making the same, sanctionable argument to this Court – that “[t]he Court should also vacate that portion of the award that grants attorneys' fees...because [t]he parties' agreements provide that Florida law shall apply... and Florida law does not allow an award of attorneys' fees.” Plaintiff's Challenge, p.4. Plaintiff should be estopped from making this argument because it is a clear violation of FINRA Rule 3110(f)(4).

It should be noted that in 2005, the NASD clarified Rule 3110(f)(4) by advising member firms of the following:

NASD originally proposed to include a provision explicitly prohibiting the use of arbitrary choice-of-law provisions in predispute arbitration agreements in order to indirectly deprive customers of rights and remedies to which they would otherwise be entitled under applicable state law. However, after reviewing the numerous comments received by the SEC on the proposal, NASD concluded that the proposed provision could be interpreted to undermine protections currently afforded investors under state law. Therefore, NASD withdrew the provision, but reminds firms that, as it has in the past, NASD will continue to interpret Rule 3110(f)(4)(A) to require that, if a choice-of law provision is used, **there must be an adequate nexus between the law chosen and the transaction or parties at issue in accordance with NASD Notices to Members 95-85 and 95-16.**

NASD Notice to Members 05-09, attached as Exhibit K<sup>10</sup>, p.3.

Plaintiff in its Challenge does not even attempt to show a nexus between Florida law and the parties in this case. The fact that Florida is the location of Plaintiff's corporate offices, alone, is an insufficient nexus. As will be shown, the arbitrators had ample evidence that Texas law applied in this case.

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<sup>10</sup> Also available for viewing at:  
[http://finra.complinet.com/en/display/display\\_main.html?rbid=2403&element\\_id=3244](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=3244)

**b) Presumably the Arbitrators’ Considered Plaintiff’s Contention That Florida Law Applied, As It Claimed in Its Answer, And Rejected It Over Texas Law**

The Tylers’ Statement of Claim, to which Plaintiff responded, is replete with Texas law. See Exhibit D, Statement of Claim, pp. 19, 20, 21, 22, 24 and 25. Plaintiff responded by filing an Answer that contained the following statement, “Additionally, pursuant to the Customer Agreement signed by Claimants, Florida law applies to this proceeding and there is no possible violation of any Texas statute....” Exhibit E, Plaintiff’s Answer, p.10. Plaintiff’s argument that Florida law applied to the case presumably was considered by the arbitrators. The Award itself recites:

**OTHER ISSUES CONSIDERED & DECIDED**

The Arbitrators acknowledge that they have each read the pleadings and other materials filed by the parties.

Exhibit A, the Award.

Every reasonable presumption should be indulged to uphold the arbitration proceeding. Peacock v. Wave Tec Pools, Inc., 107 S.W.3d 631, 635 (Tex. App.–Waco, 2003). It is reasonable to presume that the arbitrators considered the application of Florida law and instead opted to apply Texas law.

**c) The Panel Acted Within Its Authority and Powers Applying Texas Law**

As stated by the Texas Supreme Court, “the authority of arbitrators is derived from the arbitration agreement and is limited to a decision of the matters submitted therein either expressly or by necessary implication.” Gulf Oil Corp. v. Guidry, 160 Tex. 139, 327 S.W.2d 406, 408 (Tex.1959). There should be no dispute that the agreement between the Tylers and Plaintiff is a broad one. See, 950 Corbindale, L.P. v. Kotts Capital Holdings Ltd. Partnership, 316

S.W.3d 191, 193 (Tex. App.–Houston [14 Dist.], 2010)(arbitration agreement clause is broad where it provides for arbitration of “any dispute arising between the parties,” or “any controversy or claim arising out of or relating to the contract thereof,” or “any controversy concerning the interpretation, performance or application of the contract.”).

Since the arbitration clause at issue is a broad one, a dispute between the parties concerning which law applies is just as arbitrable as a dispute concerning the merits of the claim itself. In Millmaker v. Brusco, 2008 WL 4560624 (S.D. Tex. 2008), the defendants claimed that the arbitrator exceeded his authority in awarding to plaintiff attorneys' fees, expenses, and arbitration costs because his award was contrary to specific language in the parties' agreement. The court looked to the language of the arbitration clause that specifically gave the arbitrator the power to decide “any disputes pertaining to the meaning or effect of this Agreement” and wrote:

“Although the [C]ourt might not have reached the same conclusion regarding [the Paragraphs'] applicability, this is not the test.” Torch E & P Co. v. J.M. Huber Corp., Civil Action No. H-06-1786, 2006 WL 3761814, at \*3-4 (S.D.Tex. Dec.20, 2006) (Lake, J.)(affirming an arbitral award where the arbitrator interpreted the governing agreement not to preclude the eventual award), aff'd, 234 F. App'x 231 (5th Cir.2007), cert. denied, --- U.S. ----, 128 S.Ct. 1074, 169 L.Ed.2d 809. “[T]he question of interpretation of the [Agreement] is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns the construction of the contract, the courts have no business overruling him because their interpretation of the contract is different than his.” Kergosien, 390 F.3d at 353 (emphasis in original). The court should not “impermissibly substitute[ ] its own construction of the Agreement over the [arbitrator's].” In re Heritage Org., L.L.C., Civil No. 3:06-CV-0578-H, 2006 WL 2642204, at \*5-7 (N.D.Tex. Sept.14, 2006) (affirming an arbitral award refusing to split costs where the agreement provided “costs and expenses of the arbitrators for any arbitration shall be split evenly” between the parties); NetKnowledge Techs., L.L.C. v. Rapid Transmit Techs., Civil Action No. 3:02-CV-2406-M, 2007 WL 518548, at \*6 (N.D.Tex. Feb. 20, 2007) (concluding that an agreement's broad language, which gave the arbitrator authority to resolve “[a]ny disputes arising under or relating to” the agreement, permitted the arbitrator to interpret the arbitration agreement in such a way as to not give effect to a limitation of liability clause and a merger clause), aff'd, 269 F. App'x 443 (5th Cir.2008).

The broad arbitration clause in this case likewise should compel the conclusion that the arbitrators had the authority to interpret the Agreement and which law would apply to the case. The Court should decline Plaintiff's invitation, based on an "authority" argument, to redetermine the issue concerning which law applied when the arbitration clause clearly gave the arbitrators the power to make such a determination.

Notwithstanding the fact that the parties agreed to submit the issue of attorneys' fees to the arbitrators, Plaintiff argues that the arbitrators exceeded their authority in awarding attorneys' fees. Yet, it is clear from the record that the arbitrators acted within their authority by applying Texas law, because the parties had the most substantial relationship with Texas: the Tylers resided in Texas during the time period of the wrongdoing and did business with Plaintiff exclusively in Texas. The brokerage services provided by Plaintiff and its employees were performed exclusively in Texas. And the arbitration itself took place in Dallas, Texas. Since Texas had the most significant contacts with the parties, Texas law was properly applied.

Arbitrators only exceed their powers when they decide matters not properly before them. Ancor Holdings at 829. The issue of the Tyler's recovery of their attorneys' fees under Texas law was before them from the outset of the case; they pled for attorneys' fees under Texas law. Exhibit D, Statement of Claim, p.25. Moreover, Defendants argued the application of Texas law during the arbitration. In closing argument, Defendant's counsel explained to the panel the various grounds upon which they could issue an award of attorneys' fees, including breach of contract:

BY MS. STONEMAN:

25           And let me just tell you about the other

1 bases for attorney's fees, the claim that we have  
2 made. Attorney's fees in Texas are recoverable in  
3 your discretion for a breach of contract. You saw me  
4 put up on the screen the rules and regulations that  
5 the firm agreed to follow in their contract with Mr.  
6 Hurshel Tyler. You saw Paul Davis' contract with the  
7 firm where he agreed to abide by the rules and  
8 regulations.

9           And on page 15 of our tab 14 is a  
10 provision from the Texas Civil Practice and Remedies  
11 Code that says you can recover attorney's fee when you  
12 establish a breach of contract.

Volume 5 of Transcript, p. 176.

The arbitrators acted within their power and authority by applying Texas law, because the arbitrators had the authority to determine which state law applied and they had ample evidence and reason to apply Texas law, particularly in view of Plaintiff's failure to offer any countervailing arguments during the arbitration hearing. As the Dallas appeals court recently stated, "[W]e are mindful of other courts' caution against a party's 'use of the 'authority' argument as a ruse to induce the reviewing court to 'redetermine the facts—even just a tiny bit—or reach a legal conclusion on them as found or hoped for which differs from that of the' arbitrators.'" [citations omitted]. Centex/Vestal v. Friendship West Baptist Church, 314 S.W.3d 677, 686 (Tex. App.–Dallas, 2010).

**d) Plaintiff's Failure To Argue The Application Of Florida Law In Either Its Pre-Hearing Brief Or Any Time During The Five-Day Arbitration Constitutes A Waiver**

The single sentence in Plaintiff's Answer that states that Florida law should apply to the case appears under the heading "Respondent Did Not Violate Any Texas Statute." Nowhere in Plaintiff's Answer is the argument made that Florida law prevents the award of attorneys' fees. Plaintiff even has a heading in its Answer: "Claimants Are Not Entitled to Punitive Damages or Attorneys' Fees," yet the arguments made thereunder do not mention Florida law. Exhibit E, Plaintiff's Answer, p.10. Plaintiff also filed a legal brief, yet nowhere in the brief does Plaintiff argue that Florida law governs the case or that Defendants are not able to recover attorneys' fees under Texas law.

More incredulous, however, is the fact that at no time during the five-day arbitration did Plaintiff raise the issue of Florida law applying, despite having ample opportunity to do so. The Tylers presented evidence to the arbitration panel of their attorneys' fees. Defendants' counsel, the undersigned, took the stand and testified on the issue of attorneys' fees and costs and testified how the factors set out in Texas Disciplinary Rule 1.5 to determine the reasonableness of an attorney fee applied. Volume 2 of Transcript, pp. 487 – 497. Plaintiff's counsel commented about how in her experience it was only in Texas where claimants' counsel took the stand to testify as to attorneys' fees:

2 MS. REYES: However, I don't want to  
3 start his cross-examination and then him go home for  
4 the night and reopen it. The two options Tracy and I  
5 discussed is she thought about doing her testimony  
6 regarding her fees or it's 20 to 5, we could also just

7 wrap for the day.

8 MS. STONEMAN: My preference would be,  
9 because I have, I believe, what I need, and I don't  
10 think it would take very long, for me to just testify  
11 about the attorneys' fees that we're seeking in  
12 addition.

13 ARBITRATOR FREEMAN: That's fine. Good  
14 idea.

15 MS. STONEMAN: Would you like me to sit  
16 over there?

17 ARBITRATOR FREEMAN: No, it's fine. You  
18 probably could be heard better on the recorder.

19 MS. REYES: As a side note, the only  
20 place I see this done is in Texas.

21 MS. STONEMAN: What done?

22 MS. REYES: Someone testifying as to  
23 their own attorneys' fees.

24 MS. STONEMAN: Really?

25 MS. REYES: Yes. In every hearing I have

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1 in Texas, I see it, and no place else.

2 MS. STONEMAN: Well, that's interesting.

3 MS. REYES: Just random fun fact for you.

Volume 2 of Transcript, pp. 485 and 486.

Plaintiff's counsel could have argued here that Florida law applied but she did not. She did not cross examine Defendants' counsel nor raise any objection that Texas law applied to the case, including on the issue of attorneys' fees. Plaintiff has waived the argument that Florida law applies.

Arguments that affect choice of law can be waived. Entergy Gulf States, Inc. v. Public Utility Commission of Texas, 173 S.W.3d 199, 210 (Tex. Civ. App.–Austin, 2005)(preemption argument that affects forum rather than choice of law cannot be waived and may be raised on appeal; however, an argument that affects choice of law can be waived). And waiver can result from a failure to raise the later-complained of issue to the arbitrators during the hearing. In Orangefield Independent School Dist. v. Callahan & Associates, 93 S.W.3d 124, 128 (Tex. App.-Beaumont, 2001), the court held that the school district (OISD) waived its right to complain on appeal from the trial court's confirmation of arbitration award that the arbitrator exceeded his statutory authority in awarding to the architect prejudgment interest and attorneys' fees, where the school district failed to raise this issue before the arbitrator. In so holding, the court stated as follows:

OISD was required to raise it at arbitration to avoid waiver. See Babcock & Wilcox Co. v. PMAC, Ltd., 863 S.W.2d 225, 232 (Tex.App.—Houston [14th Dist.] 1993, writ denied)(quoting, with approval, Marino v. Writers Guild of Am., East, Inc., 992 F.2d 1480, 1484 (9th Cir.1993) in which the Ninth Circuit stated: “a party may not sit idle through an arbitration procedure and then collaterally attack that procedure on grounds not raised before the arbitrator when the result turns out to be adverse. This rule extends even to questions such as arbitrator bias, that go to the very heart of arbitral fairness.”

Orangefield at 128.

Despite the scant reference to Florida law applying in Plaintiff's Answer, Plaintiff has waived the argument that the Florida choice of law clause governs the arbitration as a result of

failing to mention the issue in the five-day arbitration and failing to raise it in its pre-hearing brief.

**e) Plaintiff Pled Recovery for Its Attorneys' Fees, so Plaintiff's Argument is Disingenuous**

Plaintiff itself requested attorney's fees from Defendants in the arbitration. Plaintiff's

Answer to the Tylers' Statement of Claim states as follows:

- Therefore, Claimants are not entitled to any recovery against Respondent, this arbitration should be dismissed and attorneys' fees should be assessed against Claimants.
- Respondent requests that it be awarded forum fees, costs, expert fees, attorneys' fees....
- WHEREFORE, Respondent requests that the Panel enter an award in its favor:
  2. Assessing all forum costs, attorneys' fees, expert fees, and other costs against Claimants....

Exhibit E, Plaintiff's Answer, pp. 6, 11, and 13.

If "Florida law does not allow an award of attorneys' fees" (Plaintiff's Challenge, p.4), then how is it that Plaintiff can seek them? If it's because Plaintiff was not certain if Florida law would apply and believed that Texas law might apply, its argument to this Court on attorney's fees is disingenuous.

Regardless, the arbitrators had ample authority upon which to award the Tylers attorneys' fees. One such authority is the fact that both parties requested attorneys' fees. FINRA provides the following instruction to its arbitrators regarding attorneys' fees:

**Attorneys' Fees**

The authority for granting attorneys' fees must be included in the award. If the arbitrators have doubts regarding their authority to award such fees, they should

request the parties to brief the issue. There are three situations when parties may pursue attorneys' fees:

- a contract includes a clause that provides for the fees;
- the fees are allowed as part of a statutory claim; or
- **all of the parties request or agree to such fees.**

Exhibit F, FINRA Arbitrator's Guide, p.52 [emphasis added].

The record does not reflect that the arbitrators had any doubts regarding their authority to award attorneys' fees, nor did they request the parties to brief the issue. It is clear that both Plaintiff and Defendants requested attorney's fees. This was brought to the attention of the arbitration panel by the Tyler's counsel in closing argument:

BY MS. STONEMAN:

13           The Texas Insurance Code, likewise, has a  
14 provision that says if you find a violation of the  
15 Texas Insurance Code, you have the ability to award  
16 court costs and attorney's fees. And as I mentioned,  
17 the DTPA. Oh, and the other reason is Raymond James  
18 asks for them. If you look at the answer that they  
19 filed in this case, you'll see a paragraph at the end  
20 that says and we want our attorney's fees. Well, my  
21 goodness, what better evidence is there than that.

Volume 5 of Transcript, p.176.

Accordingly, Plaintiff's request for attorneys' fees is not only disingenuous; it is an additional basis for the panel to award attorneys' fees to the Tylers. See Babcock & Wilcox Co. v. PMAC, Ltd., 863 S.W.2d 225 (Tex. App.–Hous. [14 Dist.], 1993)(trial court was precluded

from interfering with arbitrator's jurisdiction and impermissibly modifying arbitrator's decision regarding attorney's fees where parties agreed to submit issue of attorney's fees to arbitration).

Nafta Traders, Inc. v. Quinn, No. 08-0613, 2011 WL 182087 (Tex. 2011) does not compel a different conclusion<sup>11</sup>. There, the principal question addressed by the court was whether the Texas General Arbitration Act precludes an agreement for judicial review of an arbitration award for reversible error, and if not, whether the FAA preempts enforcement of such an agreement. The agreement between the parties in Nafta is very different from the broad arbitration clause here. It provided:

The arbitrator does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law.

Nafta argued in part that by agreeing to these limits on the arbitrator's authority the parties had in effect agreed to expand the narrow scope of judicial review otherwise provided by the TAA and the FAA. However, the above restriction is not akin to a choice of law provision, therefore, the Nafta case is not applicable to the issues before the court.

The arbitrators' award of attorneys' fees should be confirmed for any one of the five bases stated above - a) that Plaintiff violated a FINRA rule which prohibits firms from using an arbitration agreement to limit the ability of the arbitrators to make an award; b) that presumably the arbitrators' considered Plaintiff's contention that Florida law applied, as it claimed in its Answer, and rejected it over Texas law; c) that the panel acted within its authority and powers by applying Texas law, d) that Plaintiff's failure to argue the application of Florida law in either its pre-hearing Brief or at any time during the five-day arbitration constitutes a waiver, and e) that

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<sup>11</sup> Nor does Plaintiff enlighten the reader how the 45 page opinion supports its claim.

Plaintiff pled for recovery of its attorneys' fees, so Plaintiff's argument is disingenuous. Accordingly, Plaintiff's argument should be denied and the Award should be confirmed.

### **3. The Arbitrators Did Not Exceed Their Authority By Awarding Relief Not Requested Because The Relief They Awarded Was Requested**

Plaintiff's argument that Defendants specifically chose rescission rather than damages and emphasized their right to forego damages and insist upon a rescissionary remedy is undercut by the Tyler's counsel's acknowledgment at the arbitration that it may be too administratively difficult to order a return of the investments at issue to Plaintiff and in that case and that the panel should simply choose a figure to compensate the Tylers (Volume 5 of the Transcript, p.179 lines 9 – 16). Accordingly, Plaintiff's factual contention made the basis of this argument is not supported by the record.

In any event, the inquiry to be made is not whether the arbitrators correctly determined the remedy to be provided the Tylers, but whether or not the arbitrators had the authority to do so, based upon the arbitration clause and the parties' submissions. Ancor Holdings, LLC v. Peterson, Goldman & Villani, Inc., 294 S.W.3d 818, 830 (Tex. App.–Dallas, 2009); Centex/Vestal v. Friendship West Baptist Church, 314 S.W.3d 677, 688 (Tex. App. - Dallas, 2010)(in addition to arbitration agreement, the authority of arbitrators is also derived from the matters submitted for determination); City of Baytown v. C.L. Winter, Inc., 886 S.W.2d 515, 518–19 (Tex. App.-Houston [1st Dist.] 1994, writ denied) (considering scope of arbitration pleadings and parties' agreement to determine whether arbitrator exceeded his authority).

Plaintiff agreed to submit to arbitration “any dispute or controversy,” an admittedly broad arbitration clause. Because there is an absence of any restrictive language in the arbitration clause, great latitude must be allowed in fashioning the appropriate remedy constituting the

arbitrator's decision. Peacock v. Wave Tec Pools, Inc., 107 S.W.3d 631, 639 (Tex. App.–Waco, 2003). At the arbitration, the parties acknowledged that the figure that the panel awards is “always a crazy number”. Volume 5 of the Transcript, p.124, lines 8 – 23.

It simply cannot be said that the panel rendered an award that was outside of their authority in view of the broad arbitration agreement and the Plaintiff’s agreement, if not requirement, to submit the entire controversy to arbitration. Further, the Tyler’s counsel’s statements to the arbitration panel during the hearing that the arbitrators should “do what you think is right, and do what you think is equitable in this circumstance” and that “if for some reason you are uncomfortable with that [forcing a return of the investments] or you believe that is too administratively difficult to accomplish, then Mr. Tyler will retain those investments and dispose of them at his choosing....” reinforce that the panel was well within its authority in rendering the Award that it did.

Texas courts go to great length to protect the remedies chosen by arbitrators that in some cases, relief is upheld when it is not even requested or allowed. In 950 Corbindale, L.P. v. Kotts Capital Holdings Ltd. Partnership, 316 S.W.3d 191 (Tex. App.–Houston [14 Dist.], 2010), the arbitration agreement restricted the arbitrator’s authority to awarding only compensatory damages. The court held, however, that did not foreclose the arbitrator's ability to grant declaratory relief. Likewise, in Baker Hughes Oilfield Operations, Inc. v. Hennig Production Co., Inc., 164 S.W.3d 438, 443 (Tex. App.-Houston [14.Dist.], 2005, the court held that the arbitration panel did not exceed its authority in awarding \$351,090.43 to the oil company for damages based upon breach of contract, even though breach of contract was not submitted in the arbitration pleadings. The court held that the agreement to arbitrate was so broad that it subsumed any controversy or claim arising out of or relating to corporation's services, including

breach of contract. Clearly, arbitrators are given great latitude in determining the appropriate remedy, particularly where, as here, the arbitration clause is broad.

It should also be noted that none of the arbitrators who served in the Tyler case were lawyers. They were businessmen. FINRA states the following regarding who can serve as a FINRA arbitrator<sup>12</sup>:

We recruit arbitrators from diverse backgrounds to hear cases and ensure we efficiently meet the important demand of resolving disputes. Among other professions, our arbitrators are:

lawyers;

educators;

doctors;

accountants;

business professionals; and

securities professionals.

The FINRA arbitrators Plaintiff unjustly accuses of exceeding their authority, although not lawyers, are highly skilled and experienced in finance and securities arbitrations: (a) Roland Freeman, panel chairman, with 40 years of experience in real estate development, investment, syndication, finance, brokerage and management and veteran of 7 FINRA arbitrations that went to Award; (b) Robert Gregory, an MBA Wharton School of Finance Graduate and the retired Chief Executive Officer of Caltex Oil Malaysia and member of 15 prior FINRA arbitration panels that went to Award; and (c) Robert Chisolm, a former Controller and Vice President of

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<sup>12</sup> Available for viewing at: <http://www.finra.org/ArbitrationMediation/Neutrals/BecomeAnArbitrator/P123458>

Finance for several manufacturing companies and a member of 10 prior arbitration FINRA panels that went to Award.<sup>13</sup>

Moreover, FINRA arbitrators are instructed that they are not required to strictly follow the law but rather are to give consideration to equity, as well. Part One: An Overview of the Arbitrator's Guide states the following:

*“Equity is justice in that it goes beyond the written law. And it is equitable to prefer arbitration to the law court, for the arbitrator keeps equity in view, whereas the judge looks only to the law, and the reason why arbitrators were appointed was that equity might prevail.”*

*—Domke on Aristotle*

Exhibit F, FINRA Arbitrator's Guide, p.8

The Texas Arbitration Act recognizes this principle, as well:

§ 171.090. TYPE OF RELIEF NOT FACTOR. The fact that the relief granted by the arbitrators could not or would not be granted by a court of law or equity is not a ground for vacating or refusing to confirm the award.

Arbitrators are not akin to judges in that they can award relief that the courts cannot. The Tyler arbitrators did not exceed their authority to award the relief they did for all of the foregoing reasons.

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<sup>13</sup> The Award numbers represent only those cases that did not settle and went to award; it is not known how many additional arbitration panels these arbitrators served on, but which cases settled before an Award. This background information was pulled from the bios of each of the arbitrators.

In conclusion, Plaintiff's complaints do not fit within any of the recognized grounds to challenge an arbitration award. Instead, Plaintiff's challenge appears to be a ruse to induce this court to either redetermine the facts or reach a legal conclusion which differs from that of the arbitrators. Tex. Civ. Prac. & Rem. Code § 171.087 provides that "unless grounds are offered for vacating, modifying, or correcting an award under Section 171.088 or 171.091, the court, on application of a party, shall confirm the award." Defendants request that Plaintiff's Petition be dismissed, its Motion be denied and the Award be confirmed with interest from the date of the Award.

#### IV.

#### **DEFENDANTS ARE ENTITLED TO INTEREST FROM THE DATE OF THE AWARD**

The arbitrators awarded interest only through the date of service of the award or May 10, 2011. The Award stated that Plaintiff will pay "interest on the above-stated sum [\$1,129,796.00] at the rate of 5% per annum from and including December 1, 2006 through and including the date the Award is served." The Award was served on May 10, 2011, per p.7 of the Award, Exhibit A. Accordingly, Defendants' interest calculation only ran through May 10, 2011.

Plaintiff has not made any payments whatsoever to Defendants pursuant to the Award. Pursuant to FINRA's Code of Arbitration Procedure Rule 12904(j), Plaintiff's failure to pay the Award within 30 days of the date of the Award triggers interest accruing from the date of the Award. Rule 12904(j) provides as follows:

(j) All monetary awards shall be paid within 30 days of receipt unless a motion to vacate has been filed with a court of competent jurisdiction. **An award shall bear interest from the date of the award:**

- **If not paid within 30 days of receipt;**

- **If the award is the subject of a motion to vacate which is denied; or**
- As specified by the panel in the award.

Interest shall be assessed at the legal rate, if any, then prevailing in the state where the award was rendered, or at a rate set by the arbitrator(s).

[emphasis provided]<sup>14</sup>.

Since the panel did not specify interest after the Award, Defendants are due that interest pursuant to Rule 12904(j). The panel's pre-Award interest rate of 5% is also the post judgment interest rate in Texas. Accordingly, Defendants are entitled to a judgment in the amount of \$1,738,141, the total amount the arbitrators found Plaintiff liable for, plus interest on that sum at the rate of 5% from May 10, 2011 until paid.

There is additional authority for Plaintiff's obligation to pay interest from May 10, 2011. Plaintiff agreed in its Submission Agreement that this Court may enter judgment on the Award **plus interest**. Paragraph 4 of the Submission Agreement signed by Plaintiff and attached as Exhibit C states:

The parties agree to abide by and perform any award(s) rendered pursuant to this Submission Agreement. **The parties further agree that a judgment and any interest due thereon, may be entered upon such award(s)** and for these purposes, the parties hereby voluntarily consent to submit to the jurisdiction of any court of competent jurisdiction which may properly enter such judgment.

[emphasis added].

The Tylers therefore request that Plaintiff's Petition be dismissed, that its Motion to Modify, Correct and/or Vacate Arbitration Award be denied, that Defendants' Motion to Confirm Arbitration Award be granted and that a judgment be entered in the amount of

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<sup>14</sup> Available for viewing at:  
<http://www.finra.org/web/groups/industry/@ip/@reg/@rulfil/documents/rulefilings/p018366.pdf>

\$1,738,141 plus interest on that sum at the rate of 5% from May 10, 2011 until paid, and for such other and further relief to which the Tylers are justly entitled.

Respectfully submitted,

TRACY PRIDE STONEMAN, P.C.

BY S:/ Tracy Pride Stoneman

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### **CERTIFICATE OF SERVICE**

I certify that this Response was served on Linda Brooks, attorney for Plaintiff, this the 25th day of July, 2011.

S:/ Tracy Pride Stoneman